Tinton Falls Conva Center *and* Local 999, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO. Case 22–CA–16304

February 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On a charge filed on May 5, 1989, by Local 999, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO (Union or Local 999), the General Counsel of the National Labor Relations Board issued a complaint on June 30, 1989, against the Respondent, alleging that the Respondent has engaged in unfair labor practices within the meaning of Sections 8(a)(5) and (1) and 8(d) of the National Labor Relations Act. On July 11, 1989, the Respondent filed an answer admitting in part and denying in part the allegations of the complaint.

On May 3, 1990, the parties filed a motion to transfer this proceeding to the Board, in which they stipulated that the charge, complaint and notice of hearing, and answer in this case, and transcript of the proceedings in *Tinton Falls Conva Center and Health Care Services Group, Inc.*, Cases 22–RC–9995 and 22–RC–10018, respectively, and the attendant exhibits, the Decision and Order dated April 13, 1989, and letters dated May 5, 8, and 11, 1989, and memorandum dated May 15, 1989, appended to the motion as exhibits, constitute the entire record in this case, and that no oral testimony is necessary or desired by any of the parties. The parties waived a hearing and issuance of an administrative law judge's decision and agreed to submit the case directly to the Board for findings of fact, conclusions of law, and issuance of a Decision and Order.

On July 23, 1990, the Board issued an order approving the transfer of the proceeding to the Board. Thereafter, the Respondent and the General Counsel filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

Tinton Falls Conva Center is a health care institution which operates a nursing home providing inpatient medical and professional care services in Tinton Falls, New Jersey. During the 12 months ending December 31, 1988, a representative period, the Respondent derived gross revenues in excess of $100,000. During the same period, the Respondent purchased goods and supplies in excess of $2000 from suppliers located outside the State of New Jersey. Accordingly, we find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act. We further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Facts*

In November 1987, the Respondent purchased its nursing home facility from H.G.H. Nursing Home, Inc., d/b/a Heritage Hall Nursing Home (Heritage), retained all the former Heritage employees, and agreed to be bound as a successor to Heritage's current collective-bargaining agreement with Local 999,[1] which was effective from January 1, 1987, to December 31, 1989. The Respondent commenced its own contract negotiations with Local 999 on November 23, 1987, and reached an agreement, which the unit employees ratified on that same date. At a second meeting held on February 8, 1988, for the purpose of executing an agreement, the parties signed three versions of the new agreement, with two different sets of effective and expiration dates, as well as a yellow sheet containing six contract modifications that were agreed to that day.

Thereafter, on August 1, 1988, 1115 Nursing Home & Hospital Employees Union, New Jersey, a Division of 1115 Joint Board (Petitioner) filed a representation petition for all the unit employees except for housekeeping employees (Case 22–RC–9995), and on September 8, 1988, filed a separate petition for the housekeeping employees (Case 22–RC–10018).[2] Local 999 intervened in the representation proceeding to assert its collective-bargaining agreement with the Respondent as a bar to the petitions.

On December 9, 1988, the Regional Director issued his Decision and Order finding that a collective-bargaining agreement effective from December 1, 1987, to November 30, 1990 (one of two bearing those dates), as modified and executed on February 8, 1988, was the parties' intended final contract,[3] and con-

[1] The appropriate unit, which was the subject of a 20-year bargaining history between Heritage and Local 999, consists of:

> All nurses aides, orderlines, dietary and housekeeping employees, but excluding cooks, registered nurses, licensed practical nurses, clerical and administrative employees, professional employees, guards and supervisors as defined in the Act.

[2] The housekeeping employees have been subcontracted to the nursing home since 1977 by Health Care Services Group, Inc. (Health Care), a housekeeping service contractor, but Heritage's subcontract with Health Care provided for continuous contractual coverage by its collective-bargaining agreement with Local 999. Similarly, the February 8, 1988 contract requires any outside housekeeping service contractor to become bound to a contract containing the same essential terms.

[3] In so holding, the Regional Director relied on testimony at the hearing by Neil Frank, the Respondent's attorney, that on February 8, 1988, he inadvert-

Continued

stituted a bar to the petitions.[4] He accordingly dismissed the petitions.

Thereafter, pursuant to the Petitioner's timely request for review of the Regional Director's decision, the Board, on April 13, 1989, issued an unpublished Decision on Review and Order that reversed the Regional Director's contract-bar finding. The Board rejected the finding because it was based on parol evidence ''to explain the multiplicity of collective bargaining agreements . . . and to establish the 'correct' version and the applicable effective dates for contract bar purposes.''[5] Noting that the conflicting contracts precluded interested parties from determining the proper time for filing a petition, the Board found that no contract-bar existed. Accordingly, it reinstated the petitions[6] and remanded the matter to the Regional Director for further appropriate action.[7]

Following the Board's Decision on Review, Local 999 telephoned the Respondent to ascertain its intent regarding that decision. The Respondent replied by letter on May 5, 1989, stating in pertinent part:

> It seems to us that if there is to be an election to determine whether the employees wish to be represented by your union, or any union, the contract [of February 8, 1988] may no longer be in effect, and that we do not have to continue to honor any collective bargaining agreement including the agreement between your Union and the Company from which we purchased the [nursing] Home.

Local 999 responded on May 8, 1989, asserting that the Respondent erroneously discontinued the agreement; contending that even if the parties' contract was not valid, the Respondent was bound as a successor to the still-effective Local 999-Heritage contract, and also requesting a meeting to process pending grievances. The Respondent's answering letter, on May 11, 1989, acknowledged its status as the successor to Heritage but reasserted that it could not determine whether any contract was in effect because of the Board's decision, and therefore declined to meet and discuss grievances.

Thereafter, on May 15, 1989,[8] the Respondent sent a memorandum to employees entitled, ''The Status of the Union Contract.'' The memorandum recited that when the Respondent took over the business it contracted in good faith with the Union and had honored that contract, but that intervening election petitions filed by a rival union had prompted the Board's decision finding that there is no valid contract with the Union. The memorandum further advised employees that the Respondent had notified the Union that it no longer recognized the contract as binding, and that the Union had filed an unfair labor practice charge against the Respondent claiming that the Respondent must continue to enforce the contract. The memorandum further stated:

> The Labor Board or a court will have to decide the issue; until it does, we intend to do the following;
>
> 1. Dues deductions will not be given to the Union, but will be put into a bank account until the issue is decided.
>
> 2. We will discontinue payments to the union health plan.[9]
>
> 3. We will staff the floors and shifts to best meet the needs of our patients.
>
> 4. We will review all benefits we provide, including vacation. Lengthy vacations and vacation scheduling restrictions have always been a burden to patient care, and we intend to make sure our patients come first.
>
> 5. We can no longer recognize the grievance and arbitration procedure of the contract. Any problems or discipline will be handled directly by the Tinton Falls Administration. Similarly, we can no longer allow the Shop Stewards or the Union to present grievances on your behalf, and do not recognize the authority of the Stewards in any manner.
>
> 6. Tinton Falls Conva-Center no longer considers the contractual wage increases due October 1, 1989, and April 1, 1990, to be binding. The Administration will determine the amount and timing of any future wage increases.

Based on the above, Local 999 filed charges alleging that the Respondent unlawfully withdrew recognition and unilaterally changed terms and conditions of employment. The instant complaint alleges that the Respondent repudiated the terms of the collective-bargaining agreement and withdrew recognition, and thereby engaged in unfair labor practices within the

ently also obtained the parties' signatures on an earlier draft contract whose term was from November 24, 1987, to November 23, 1990.

[4] As the Regional Director found that the housekeeping employees were jointly employed by the Respondent and Health Care and covered by the contract between the Respondent and Local 999, he concluded that the same contract also barred the petition for the housekeeping employees.

[5] The Board cited *United Fish Co.*, 156 NLRB 187 (1965), which holds that the length of the term of the contract as well as its adequacy must be ascertainable on its face, without resort to parol evidence, for it to be a bar.

[6] The Board did not pass on any other issues raised on review.

[7] The Respondent has moved, in this proceeding, for reconsideration of the Board's Decision on Review. It asserts, inter alia, that the Regional Director's findings were supported by the evidence, and that Union Fish is irrelevant here because the mere 1-week difference in the contracts' effective dates did not create confusion regarding the ''open'' periods, in view of the fact that regardless of when the correct contract expiration date was, the petitions were premature by almost 2 years.

The Respondent could have filed a timely motion for reconsideration at the time of the Board's Decision on Review, pursuant to Sec. 102.65(e) of the Board's Rules and Regulations, but did not do so. We therefore deny the motion for reconsideration as untimely. See Fall River Savings Bank, 250 NLRB 935 fn. 12 (1980), enfd. 649 F.2d 50 (1st Cir. 1981).

[8] It is undisputed that the parties honored all the terms of the (February 8) collective-bargaining agreement until May 15, 1989.

[9] The collective-bargaining agreement contains no reference to a health plan but rather to the Union's welfare fund.

meaning of Sections 8(a)(5) and (1) and 8(d) of the Act.

B. *Contentions of the Parties*

The General Counsel urges the Board to find that the Respondent unlawfully terminated its obligations under the collective-bargaining agreement executed on February 8, 1988,[10] and to reject its contention that the Board's reversal of the Regional Director's contract-bar finding had the effect of invalidating that contract.

The Respondent asserts that the Board erred by overruling the Regional Director's contract-bar finding,[11] and that the Board's determination–-that the lack of a ''final'' contract created a question concerning representation—constituted a reasonable basis for its good-faith doubt as to the Union's continued majority status, pursuant to *Dresser Industries*, 264 NLRB 1088 fn. 7 (1982), and obliged the Respondent to maintain a neutral posture in the upcoming election, and to rescind its contract.

C. *Discussion*

We find, for the reasons set forth below, that the Respondent's conduct violated Section 8(a)(5) and (1) of the Act, as elucidated in Section 8(d).

Section 8(d) provides that when a collective-bargaining contract is in effect, ''the duty to bargain collectively shall also mean that no party to such contract shall [unilaterally] terminate or modify such contract.'' The evidence before us establishes that the Respondent and the Union mutually accepted their February 8, 1988 contract as final and binding at all times prior to the Board's reversal of the contract-bar finding. Thereafter, on May 15, 1989, the Respondent unilaterally repudiated the contract terms and withdrew recognition from the Union,[12] based on its assertion that the Board's decision invalidated that contract and raised a question concerning representation that warranted a good-faith doubt as to the Union's continuing majority status.

Contrary to the Respondent, the Board has held that the validity of an incumbent bargaining representative's existing contract is unaffected by an outside union's petition for an election, or the direction of a representation election under such a petition, and that an employer's repudiation of a contract in such circumstances ''may constitute unwarranted involvement in the process by which employees select their collective-bargaining representative.''[13] We specifically reject the Respondent's contention that the Board's finding of no contract-bar invalidated the bargaining agreement that the parties abided by until May 15, 1989; the Board's finding merely allowed the continued processing of the representation petition. The Respondent's contention fails to take account of the different purposes served by the contract-bar rule and the policies of Section 8(d). As the Board explained in *Union Fish Co.*, supra, 156 NLRB at 191, its contract-bar rule is designed to accommodate two objectives—giving the parties to a contract a ''reasonable period'' of ''industrial stability free from petitions seeking to change the bargaining relationship,'' while, at the same time providing ''employees the opportunity to select bargaining representatives at reasonable and predictable intervals.'' The second objective cannot easily be achieved if petitioning employees must go beyond the face of a collective-bargaining agreement to determine whether it is in effect and for what period. Ibid. The policy of Section 8(d), made clear by its express terms, is simply to require parties to abide by collective-bargaining agreements to which they have mutually agreed. This policy would be disserved if a party could clearly agree to a contract and then escape abiding by its commitment on the ground that the evidence of its agreement consisted, in part, of parol evidence.

We likewise find no merit in the Respondent's contention that this circumstance created a reasonable doubt as to the incumbent's continued majority status.[14] Even in the absence of a bargaining agreement, the filing of a representation petition does not serve to suspend an employer's obligation to continue bargaining with the incumbent union and to execute any resulting agreement, pending resolution of the question concerning representation.[15] Even the filing of a decertification petition in this case would not have afforded the Respondent any basis for repudiating its contract. *Dresser Industries*, supra, 264 NLRB at 1089. In short, as stated in *VM Industries*, at 6:

> [A]n employer may not unilaterally modify or cancel a collective-bargaining agreement on the ground that, during its pendency, the question of future employee representation is about to be decided through the medium of the machinery established by the Act to resolve such questions. Unless and until the incumbent union is supplanted

[10] The General Counsel claims that the different contract versions are substantially the same so that the Respondent understood all the terms.

[11] As noted in fn. 7, supra, the Respondent's motion for reconsideration has been denied as untimely.

[12] The General Counsel's brief does not specifically mention the complaint's withdrawal-of-recognition allegation. We find that the Respondent's language in par. 5 of the May 15, 1989 memorandum to employees amply supports the finding that the Respondent no longer considered the Union to be the employees' bargaining representative. Moreover, the Respondent, in its brief, has clearly conceded this point, to wit:

> [The Respondent] did not unlawfully withdraw its recognition of Local 999 upon mere filing of a petition . . . [but instead] waited until the Board declared that there was a real question concerning representation before withdrawing recognition . . . .

[13] *VM Industries*, 291 NLRB 5, 6 (1988).

[14] An incumbent union ''enjoys an irrebuttable presumption of majority status during the term of a collective-bargaining agreement.'' *Sisters of Mercy Health Corp.*, 277 NLRB 1353 (1985).

[15] See *Len Martin Corp.*, 282 NLRB 482 (1986), reaffirming *RCA Del Caribe*, 262 NLRB 963 (1982).

by a rival union, the existing contract governs the employer's relations with its employees.

We accordingly find, based on the stipulated facts, that the Respondent violated Section 8(a)(5) and (1) by unilaterally repudiating its contract during its term[16] and by withdrawing recognition from the Union.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2),(6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of the employees in the following appropriate unit:

> All nurses aides, orderlies, dietary and housekeeping employees, but excluding cooks, registered nurses, licensed practical nurses, clerical and administrative employees, professional employees, guards and supervisors as defined in the Act.

4. The Respondent has violated Section 8(a)(5) and (1) of the Act by repudiating the terms of the contract entered into on February 8, 1988, and by withdrawing recognition from the Union.

5. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, we shall order the Respondent to abide by the terms of the February 8, 1988 collective-bargaining agreement, and on request, to bargain collectively in good faith with the Union as the exclusive representative of the unit employees concerning wages, hours, and other terms and conditions of employment, and, if an understanding is reached, to embody the understanding in a signed agreement.[17]

Having found that the Respondent repudiated and failed to honor the collective-bargaining agreement after May 15, 1989, we shall order it to make the employees whole, with interest, for any loss of earnings or other benefits suffered by them as a result of the Respondent's conduct, in the manner prescribed in *Ogle Protective Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). We shall also order the Respondent to make the employees whole by requiring it to pay all delinquent contributions owing under the contract to the Union's Welfare Fund,[18] and to reimburse them, with interest, for any expenses they may have incurred as a result of the Respondent's failure to make the requisite Welfare Fund contributions, in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). Finally, we shall order the Respondent to remit, with interest, all withheld dues to the Union, in the manner prescribed in *Ogle Protective Service*, supra. All interest due and owing shall be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The Respondent, Tinton Falls Conva Center, Tinton Falls, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 999, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO, the Union, by unilaterally repudiating the terms of its collective-bargaining agreement of February 8, 1988, and withdrawing recognition from that labor organization.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Abide by the terms of the February 8, 1988 collective-bargaining agreement with the Union.

(b) Make its employees whole, with interest, for any loss of earnings or other benefits by reason of its failure to honor its contractual obligations under the collective-bargaining agreement of February 8, 1988, in the manner prescribed in the remedy section of the Decision and Order.

(c) Pay into the Union's welfare fund the amounts due under the contract and remit to the Union, with interest, the dues it withheld from the employees' paychecks.

(d) On request, bargain collectively in good faith with the Union as the exclusive bargaining representative of the employees in the following appropriate unit concerning wages and hours and other terms and conditions of employment and, if an understanding is

[16] As a result of such repudiation, the Respondent, as set out in its May 15, 1989 memorandum, specifically discontinued making remittance of dues and payments to the employee health plan, and refused to comply further with established shift and floor staffing, benefits, vacation scheduling, and grievance and arbitration procedures. It also announced that it would not adhere to the timing and amounts of contracutal wage increases.

[17] We are administratively advised that the representation elections have been deferred pending the conclusion of this proceeding. Our order requiring the Respondent to bargain with the Union on request is in accord with the Board's holding in *RCA Del Caribe*, supra.

[18] Any additional amounts to such payments shall be computed in accordance with the Board's decision in *Merryweather Optical Co.*, 240 NLRB 891 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).

reached, embody the understanding in a signed written agreement:

> All nurses aides, orderlies, dietary and housekeeping employees, but excluding cooks, registered nurses, licensed practical nurses, clerical and administrative employees, professional employees, guards and supervisors as defined in the Act.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of the payments due under the terms of this Order.

(f) Post at its facility at Tinton Falls, New Jersey, copies of the attached notice marked ''Appendix.''[19] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 22 in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local 999, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO by unilaterally repudiating our collective-bargaining agreement of February 8, 1988, or withdrawing recognition from that labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL abide by the terms of our February 8, 1988 collective-bargaining agreement with the Union.

WE WILL make our employees whole, with interest, for any loss of earnings or other benefits by reason of our failure to honor our contractual obligations under the February 8, 1988 collective-bargaining agreement.

WE WILL pay into the Union's welfare fund the amounts due under the contract and remit to the Union, with interest, the dues we withheld from the employees' paychecks.

WE WILL, on request, bargain collectively in good faith with the Union as the exclusive bargaining representative of the employees in the following appropriate unit concerning wages and hours and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed written agreement:

> All nurses aides, orderlies, dietary and housekeeping employees, but excluding cooks, registered nurses, licensed practical nurses, clerical and administrative employees, professional employees, guards and supervisors as defined in the Act.

TINTON FALLS CONVA CENTER